Cavalier next contends that "the proposed ICA does not seem to provide specifically for the type of orderly process described by Verizon at the October 16, 2003 hearing." *Cavalier Post-Hearing Brief* at 63. Cavalier ignores Section 28.9 of the Agreement, which is not in dispute. This Section sets forth in precise detail how all bona fide disputes are to be handled by the parties. *See, e.g.*, Agreement § 28.9.3 (requiring the party disputing any amount billed to notify the billing party of the basis for its dispute within sixty days and to pay the undisputed amounts), § 28.9.4 (describing procedures for escalation to designated representatives if the dispute is not resolved within sixty days of notice), § 28.9.5 (describing further escalation procedures), § 28 9.6 (requiring confidentiality for all bona fide dispute resolution negotiations), § 28.11 (describing in detail when negotiation or arbitration shall be used, and when litigation shall be used, to resolve disputes), § 28.11.7.1 (allowing for Commission review of arbitrators' decisions); *see also Hearing Tr.* at 313:21 – 315:6 (Smith) (describing Verizon's procedure for handling CLEC billing disputes).

The reality is that if Cavalier has a bona fide dispute with Verizon with regard to *any* bill of *any* amount, it has nothing to worry about – Section 20.6 forbids Verizon from using amounts withheld due to bona fide disputes to invoke the assurance of payment provisions. *See Smith Rebuttal* at 12:8-18; *Hearing Tr.* at 310:10-12 (Smith).

Cavalier dismisses the fact that the Bureau approved of similar language in the Virginia arbitration by claiming that AT&T "may have been exempted" from the assurance of payment provisions. *Cavalier Post-Hearing Brief* at 62. This is false. The *Virginia AT&T Agreement* contains assurance of payment provisions, which were adopted by the Bureau. *Virginia Arbitration Order* ¶ 972 Indeed, it is the language from the *Virginia AT&T Agreement* that Verizon largely proposes here. Although Cavalier mentions that the Bureau "expressly exempted MCI from these requirements so long as MCI's net worth exceeded $100 million" (*Cavalier Post-Hearing Brief* at 62), Cavalier neither asks for such an exemption here nor contends that it would fall within it. Moreover, a major reason the Bureau added the language was to help "establish Verizon's right to request assurances of payment from smaller or less-stable competitive LECs that may opt into the agreement, while recognizing the parties' intent to exempt WorldCom from the provision at the present time." *Virginia Arbitration Order* ¶ 972. Finally, Cavalier also fails to mention that MCI also argued for the deletion of the assurance of payment provisions – an argument which the Bureau expressly rejected. *Id.* ¶¶ 726-727.

Cavalier's concern that Verizon will invoke the assurance of payment provisions if Cavalier fails to timely pay a bill due that Verizon furnishes "late" is equally unfounded. *Cavalier Post-Hearing Brief* at 62. Verizon's proposed contract language does not allow Verizon to invoke the assurance of payment provisions if Cavalier does not pay a bill it does not receive. *Hearing Tr.* at 311:22 - 312:7 (Smith) ("We wouldn't expect them to pay the bill before they get it, or not to have a reasonable period of time to review the bill. So that's why it's either 30 days from the bill date or 20 days from the bill receipt date."). This is consistent with the measures suggested by the Commission in its December 23, 2002 Policy Statement. Policy Statement, *Verizon Petition for Emergency Declaratory and Other Relief*, WC Docket No. 02-202, FCC 02-337, ¶ 29 (rel. Dec. 23, 2002) ("Policy Statement") (recommending measures which are "tied to timely arrival of the interstate access bill").

Similarly, Cavalier is simply wrong when it asserts that "Verizon's proposed Section 20.6 does not comply with the principles outlined in the Commission's December 20, 2002 Policy Statement." *Cavalier Post-Hearing Brief* at 63. Verizon's proposed language is consistent with the Policy Statement's guidelines regarding *de minimis* exceptions and the proven history of late payment trigger, contrary to Cavalier's assertion. *Id.* at 64. Subsections (x) and (y) of Verizon's proposed language only allow Verizon to bill Cavalier in advance if Cavalier misses two payments in a 60-day period or three payments in a 180-day period. Verizon's Proposed Section 20.6(x)-(y). These are "clear and explicit" standards for defining a "proven history of late payment," as contemplated in the Policy Statement. *See* Policy Statement ¶ 29. *See also id.* ¶ 27 ("[W]e recommend that the incumbent LEC tariffs specify that advance billing is triggered only by concrete, objective standards that are narrowly tailored to target only those customers that pose a genuine risk of nonpayment, in order to prevent any unreasonable discrimination among customers.").

Moreover, Verizon may bill Cavalier in advance only if the delinquent amount is five percent or more of the total bill for the relevant period for delinquent payments. *Id.* Verizon's proposed language is therefore consistent with the Policy Statement, especially considering the fact that Cavalier has an actual proven history of late payment of Verizon's bills. *See Hearing Tr.* at 313:4-18 (Smith) ("In the past we have had issues with the timeliness of payment with Cavalier. … [f]or a period of time, they refused to pay their bills in total."); *Smith Direct* at 25:18-24.

Cavalier also claims that Verizon's proposed language would allow it to advance-bill Cavalier the allegedly excessive amount of $2.5 million per month. *Cavalier Post-Hearing Brief* at 64. But Cavalier admits that it already pays 70-80% of its Verizon bills in advance, with only about $750,000 per month billed in arrears *Id* Thus, if Cavalier demonstrates a proven history of late payment (*i e* , it fails to pay two bills not subject to bona fide dispute in 60 days or three bills in 180 days, and the delinquent amounts are not *de minimis*), Verizon's assurance of payment language would only mean that Cavalier must pay its *entire* estimated $2.5 million bill in advance (subject to quarterly true-up), instead of the $1.75 million of it that Cavalier already pays in advance. This extra $750,000 that would be subject to advance payment, at only 50% of Cavalier's net monthly payments to Verizon, is surely a reasonable amount. *See Cavalier Post-Hearing Brief* at 64; *Hearing Tr.* at 320:18 – 321:1 ("MR. LERNER: But as far as credit risk goes, a general rule, is Verizon a net payer or is Cavalier a net payer? MR. WHITT: We're a net payer to Verizon. MR. SMITH: By approximately a million and a half dollars a month, I think it is.").

Finally, Cavalier contends that Verizon's proposed language calls for a disproportionately high deposit. *Id* at 62. As Verizon has stated before in this proceeding, Cavalier's claim that Verizon could demand a $7.5 million deposit is meritless. Verizon's proposed Section 20.6 only permits Verizon to require a *one-month* advance payment, not two months as Cavalier claims, and only when Cavalier has missed two payments within 60 days or three payments within 180 days, there are no bona fide disputes, and the missed payments are not *de minimis*. *Smith Rebuttal* at 12:19 – 13:10. Moreover, this one-month advance payment is not due until thirty days later. *Id.* at 13:10-13. And Verizon may only require a security deposit or letter of credit from Cavalier if Cavalier is not creditworthy; while the letter of credit or security deposit must be equal to two months' estimated charges, Verizon may not draw on this credit until 30 days after notifying Cavalier that it is delinquent in paying its bills. Verizon's Proposed § 20.6; *Smith Rebuttal* at 12:8-18.

Verizon's proposed assurances of payment are reasonable and fair to Cavalier, and they are consistent with the Commission's Policy Statement. The Bureau should therefore adopt Verizon's proposed language in its entirety.

XIV. THE BUREAU SHOULD ADOPT THE EMBARGO LANGUAGE THAT IT APPROVED IN THE VIRGINIA ARBITRATION (ISSUE C24)

In its post-hearing brief, Cavalier concedes that it is asking this Bureau to revisit the Virginia SCC's embargo rules because it alleges that "the current 'embargo' regime in Virginia is neither fair nor reasonable." *Cavalier Post-Hearing Brief* at 67. The Bureau obviously cannot modify the Virginia SCC's rules relating to embargoes and terminations. Instead, it should adopt Verizon's Proposed Section 22.4 which protects both Cavalier's and Verizon's rights. Section 22.4 would allow Verizon to terminate services to Cavalier only if Cavalier fails to cure a default that is not subject to bona fide dispute within sixty days. This proposed language was approved in the *Virginia Arbitration Order*, and it complies with Virginia law governing termination of service. *Verizon Response, Exhibit A* at 53-54; *Smith Direct* at 22:11-26:19; *Smith Rebuttal* at 15:18-17:12; *Hearing Tr.* at 329:15 – 330:3, 330:11 – 331:1 (Smith). The Bureau should adopt the same language again.

Cavalier itself agrees that the embargo process is a necessary tool for carriers who interconnect and exchange traffic. *See Cavalier Post-Hearing Brief* at 65; *Hearing Tr.* at 327:18-20 (Whitt) ("[W]e feel like the embargo process works."). However, rather than follow Virginia law with regard to notification of discontinuance, Cavalier seeks special dispensation from that law that would result in wasteful, duplicative litigation.

Cavalier concedes that, under the current system, *every single billing dispute* between Cavalier and Verizon has been resolved. *Cavalier Post-Hearing Brief* at 65 ("In *every case*, the parties have managed to work out their differences….") (emphasis added); *Hearing Tr* at 327:18 - 328:5 (Whitt). Cavalier's mention of "the occasional need to seek formal or informal relief at the appropriate state public service commission" (*Cavalier Post-Hearing Brief* at 65) does not, as Cavalier argues, demonstrate the need for *additional* regulatory oversight in the form of a

Virginia SCC or Commission order approving a termination. Rather, it shows that the present system works and does not need repair: Cavalier already has the opportunity to seek formal or informal relief from the Virginia SCC.

Cavalier's only justification for its proposed language is its unsubstantiated suggestion that Verizon will unilaterally decide that Cavalier's billing disputes are not bona fide, as part of some nefarious plan to drive Cavalier out of business. *Cavalier Post-Hearing Brief* at 65-66 This is not true: as Verizon witness Smith explained at the hearing, Verizon treats every dispute from Cavalier as "bona fide" until after Verizon has conducted a full investigation into the dispute. *Hearing Tr.* at 313:21 – 314:10. If Cavalier disagrees with Verizon's determination, Cavalier can escalate that decision, subjecting the dispute to further review under Section 28.9 of the Agreement. *Hearing Tr.* at 313:21-315:6 (Smith). At no point during this dispute and escalation process may Verizon issue default notices for any of the amounts in dispute. *Id*

The Bureau should adopt Verizon's proposed language and reject Cavalier's language requiring Verizon to obtain an order from the Virginia SCC or the Commission before terminating service to Cavalier for nonpayment.

XV. CAVALIER FAILS TO JUSTIFY ITS UNPRECEDENTED PROPOSAL FOR AN UNREASONABLE AND UNNECESSARY EXCEPTION TO THE AGREEMENT'S LIMITATION OF LIABILITY PROVISION (ISSUE C25)

Cavalier erroneously frames this issue as "whether Verizon can unilaterally demand that Cavalier contract away the right to seek damages for violation of the [Act] and corresponding Virginia law governing communications." *Cavalier Post-Hearing Brief* at 67. Cavalier suggests that without its proposed exclusion to the liability limits Cavalier will "give up its right to enforce [the] law " *Id* at 68. Cavalier's arguments, however, miss a fundamental point: Verizon is entitled, pursuant to well-settled law, to limit its liability for any conduct *arising from* an interconnection agreement; AT&T and the Bureau understood that fundamental point when they accepted this exact language in the *Virginia AT&T Agreement.* By insisting on an unprecedented exception that swallows the rule, Cavalier ignores long-standing precedent. Cavalier has identified no reason for the Bureau to rule differently here.

Cavalier argues that its proposal is necessary to create an incentive for Verizon to provide adequate service. *Cavalier Post-Hearing Brief* at 68-69. But Verizon's proposed language does not seek the "elimination of liability under the communications laws," as Cavalier suggests. *Id.* Verizon has every incentive to comply with the Act and the communications laws because of the Virginia Performance Assurance Plan ("PAP"). *Romano Rebuttal* at 1:19-23; *Virginia § 271 Order* ¶ 198; Order, *Establishment of a Performance Assurance Plan for Verizon Virginia Inc*, PUC010226 (Va. SCC, Filed Nov. 1, 2001). Section 26.1 of the Agreement specifically incorporates Verizon's responsibilities and liabilities under the PAP.[4] Section 25.2 sets out the agreed-upon liability limits for claims resulting from service failures.[5] Cavalier is flatly wrong that Verizon will no longer be liable for violations of the Act. Cavalier would still be entitled to recover for service failures under the PAP and Section 25.2 of the Agreement. Cavalier's proposal, on the other hand, would eviscerate the agreed-upon liability limits while providing Cavalier a cause of action for unlimited damages any time Verizon failed to provide perfect service.

Cavalier also argues that its proposed language is necessary because the relationship between Verizon and Cavalier was created by "statutory mandate rather than a commercial

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[4] As noted in Verizon's Post-Hearing Brief at 66-67, the PAP has already been approved by the Virginia SCC and by the Commission in the Virginia Section 271 Order *Virginia § 271 Order* ¶ 198; Order, *Establishment of a Performance Assurance Plan for Verizon Virginia Inc*, PUC010226 (Va. SCC, Filed Nov 1, 2001)

[5] Section 25 2 establishes that each party's liability to the other and its customers for claims resulting from service failures will not exceed an amount equal to the pro rata applicable monthly charge for the service.

incentive." *Cavalier Post-Hearing Brief* at 69. The fact that Verizon and Cavalier "do not have a typical vendor-customer relationship" only reinforces the importance of adopting the performance and penalty provisions already approved by regulators in the PAP.[6] Verizon has adequate incentive to comply with the communications laws under the PAP and Section 25.2 of the Agreement, so Cavalier's proposal is unnecessary.

Despite Cavalier's arguments to the contrary, its language is extremely broad. *See Cavalier Post-Hearing Brief* at 67. Because Cavalier's proposal would create an exclusion from the liability limits "for a claim of a violation of the laws governing communications," virtually any claim relating to this Agreement could fall under the exclusion. *See Id.* at 67-68; NSFO at 17. Any breach of the interconnection agreement could arguably be considered a violation of 47 U.S.C. §§ 151 *et seq.* and comparable Virginia law. Cavalier might claim that it does not seek perfect service, but under its proposed language it would have a claim for unlimited damages for anything short of perfect service.

Cavalier also fails to dispute several of Verizon's explanations for why the Bureau should adopt Verizon's proposal. First, Cavalier does not dispute that common carriers may reasonably limit their liability consistent with well-settled law, or that those limits serve the public interest. As the Commission has noted, limitation of liability provisions strike "a balance between the rights of the aggrieved customers and the public interest in the provision of telephone service at the lowest possible cost." *In the Matter of AT&T*, 82 F.C.C. 2d 370, 372 (1980). Second, Cavalier does not dispute that Verizon's proposed compromise language for Section 25.5 adequately addresses Cavalier's concerns regarding antitrust liability, defamation, and false advertising. *Cavalier Post-Hearing Brief* at 67. Despite these concessions, Cavalier still insists upon recycling the overbroad language from its original proposal. Cavalier should not be

[6] *See* note 4 *supra*

allowed to circumvent the PAP, seek additional damages, and reject the liability limits it agreed to in Section 25 2

Finally, Cavalier urges that the Bureau must adopt its proposal because the Commission has the unique responsibility of "standing in the shoes of the Virginia SCC" in arbitrating this contract. *Cavalier Post-Hearing Brief* at 69. But the Virginia SCC has already adopted performance guarantees in the PAP, and the Bureau should reject Cavalier's attempt to receive individualized performance standards in this contract.

XVI. THE BUREAU SHOULD REJECT CAVALIER'S PROPOSED CHARGES FOR WINBACKS AND TRUCK ROLLS (ISSUE C27)

Cavalier's Proposed Exhibit A(2) and Section 11.17 would assess on Verizon a variety of unwarranted charges that Cavalier mislabels "UNE-related," primarily for "truck rolls" and customer migrations, or "winbacks." As a threshold matter, the Bureau must reject Cavalier's proposed language because, as the Bureau recognized in the *Virginia Arbitration Order*, it lacks jurisdiction in a Section 251 arbitration to determine the rates that a CLEC proposes to charge an incumbent carrier. Even if the Bureau did have jurisdiction to consider these charges, the Bureau should reject them outright. Cavalier tries to justify these charges under the misleading guise of "reciprocity" by claiming that since Verizon charges Cavalier for truck rolls and bills Cavalier for UNE-related charges, Cavalier should be able to do the same. But Cavalier and Verizon do not have a reciprocal relationship in this context. Verizon provides a facility to Cavalier when it provides unbundled loops; Cavalier does not provide Verizon with a UNE or any other service, nor does it perform any "UNE-related functions." It makes no sense, then, for Cavalier to charge Verizon for "UNE-related" charges.

A. The Bureau Lacks Jurisdiction To Set The "UNE-Related" Rates That Cavalier Proposes To Charge Verizon.

Cavalier argues that Verizon's jurisdiction argument is "meritless," because the "Virginia SCC has already directed Cavalier to seek the compensation proposed here by way of its interconnection agreement, and not through a tariff proceeding before that Commission." *Cavalier Post-Hearing Brief* at 72, 78. Cavalier's argument is flawed for several reasons.

First, Cavalier has not been directed to do anything by the Virginia SCC. The Virginia SCC has not issued an order prohibiting Cavalier from filing a tariff for these charges. Instead, Cavalier cites to a letter from a member of the Virginia SCC's staff that responds to what appears to be a vague, unexplained, deficient tariff that Cavalier untimely attempted to file with the Virginia SCC. This letter is not an order from the Virginia SCC. Even if it were, the Virginia SCC cannot confer subject matter jurisdiction where it does not exist. Nor is it clear what this letter means. Cavalier has not provided the tariff it supposedly attempted to file or its correspondence with the staff that would have presumably explained its intention. Without these documents, there is no way to know what Cavalier proposed to the Virginia SCC's staff or what the staff's cover letter means. It is clear from the letter that Cavalier failed to include essential information about the rates Cavalier attempted to file, even information as basic as "to whom these charges will be billed." *Clift Direct* at Exhibit MC-11. The Virginia SCC staff member, Mr. Hines, clearly believed that Cavalier's tariff filing was too vague to understand, so he suggested how Cavalier should proceed. He did not indicate, as Cavalier alleges, that these charges should not be tariffed nor did he state that the Virginia SCC would refuse to consider these rates, if properly filed, in a tariff proceeding. Therefore, Cavalier has failed to prove that it is "without a forum" to present its proposed charges for review. *Cavalier Post-Hearing Brief* at 78.

Second, even if the letter from Mr. Hines said what Cavalier wanted it to say, that letter cannot overrule the Bureau's jurisdictional holding in the *Virginia Arbitration Order*:

> [T]he Bureau, acting as the Virginia Commission for purposes of this proceeding, is authorized by section 252 to determine just and reasonable rates to be charged by Verizon, not petitioners. As Cox points out, the Commission has ruled that it would be *inconsistent with the Act* for a state commission to impose section 251(c) obligations on competitive LECs.

Virginia Arbitration Order ¶ 588 (emphasis added; footnotes omitted). The Bureau's decision was based on Sections 251 and 252 of the Act, and the letter Cavalier offers from the Virginia SCC – regardless of how Cavalier interprets it – cannot trump that ruling. Cavalier never even attempts to explain why the Bureau's ruling should not apply to these charges.

Finally, Cavalier's claim that Verizon consented to jurisdiction and should be estopped from stating otherwise is demonstrably wrong. Verizon raised this defense in its Answer to Cavalier's Petition on September 5, 2003. *See Verizon's Answer, Exhibit A* at 57 ("[T]he Bureau lacks jurisdiction to determine the rates Cavalier proposes to charge Verizon"); *Albert Panel Direct* at 27:10-11 ("Because the Bureau does not have jurisdiction to set Cavalier's rates, it cannot approve Cavalier's proposed language."); *Albert Panel Rebuttal* at 20:17-18 ("The Bureau has said that it lacks jurisdiction to impose rates charged by a CLEC to an incumbent carrier, except for 'rates on which the parties have agreed' or rates which the Commission's Rules prescribe. In all other cases Cavalier must seek authorization from the Virginia SCC for the rates it proposes to charge."); *Verizon's Post-Hearing Brief* at 68 ("The Bureau has already acknowledged that it lacks jurisdiction over intrastate rates charged by competitive local exchange carriers to incumbents.").

In addition, Cavalier's waiver and estoppel theories are ill-founded. "Waiver" is a deliberate relinquishment of a legal right.[7] Verizon did not "waive" its subject matter jurisdiction defense merely by agreeing to arbitrate some portion of the issue and Cavalier points to no legal authority that would support this claim. In any event, subject matter jurisdiction cannot be waived, and can be raised at any point in a proceeding, even **sua sponte** by the Bureau.[8] Cavalier's estoppel argument is likewise without merit. A party is estopped from asserting a position only if another party relied on a contrary representation to its detriment.[9] Cavalier has not shown that it relied to its detriment on Verizon's representations concerning the arbitration of this issue.

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[7] *Johnson v Zerbst*, 304 U.S. 458, 464 (1938), *In re Varat Enterprises, Inc.*, 81 F.3d 1310, 1317 (4th Cir. 1996) ("[W]aiver principles come into play when a party voluntarily or intentionally relinquishes a known claim right."); *Hammond v Pacific Mut Life Ins Co* , 159 F. Supp. 2d 249, 256-57 (E.D. Va. 2001) ("In Virginia, '[w]aiver is the intentional relinquishment of a known right, with both knowledge of its existence and an intention to relinquish it") (quoting *Creteau v Phoenix Assur Co of N.Y* , 119 S E 2d 336, 339 (1961)); *Chas. H Tompkins Co v Lumbermens Mut Cas Co* , 732 F Supp. 1368, 1377 (E.D. Va. 1990) ("To be effective, a waiver requires that the waiving party voluntarily and intentionally abandon a known legal right ")

[8] *Insurance Corp of Ireland v Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("[N]o action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion ") (internal citations omitted); *Sigmon Coal Co , Inc v Apfel*, 226 F.3d 291, 299 (4th Cir. 2000) ("We are duty-bound to clarify our subject matter jurisdiction even if the parties do not develop it as an issue . . Unlike personal jurisdiction, subject matter jurisdiction cannot be waived . Accordingly, we must address the basis of our jurisdiction even when the parties do not pursue the topic of subject matter jurisdiction full bore ") (citing *Insurance Corp of Ireland*; *Cook v Georgetown Steel Corp* , 770 F.2d 1272, 1274 (4th Cir. 1985); *United States v White*, 139 F.3d 998, 999-1000 (4th Cir 1998), *cert denied*, 525 U S 933 (1998)).

[9] *Overstreet v Kentucky Central Life Ins Co* , 950 F 2d 931, 938 (4th Cir. 1991) ("The elements of equitable estoppel in Virginia are (1) misrepresentation or concealment of a material fact, (2) made with knowledge of the true state of facts (3) to a party ignorant of the truth of the matter misrepresented or concealed and (4) with the intention that the other party should act in reliance upon it, and (5) which does induce the other party to act on it, (6) to the injury of the relying party ") (citing *Beverage v Harvey*, 602 F 2d 657, 659-60 (4th Cir 1979); *American Mut Liab Ins Co v Hamilton*, 135 S.E. 21, 25-26 (1926)); *In re Stokes*, 198 B R 168, 178 (E D. Va 1996) ("Equitable estoppel, or estoppel *in pais*, is an estoppel which prevents a party from denying that which, by his own conduct, he has induced others to act upon as true ") (citing *Harris v City of Roanoke*, 18 S E 2d 303, 305 (1942); *Heath v Valentine*, 15 S E 2d 98, 100 (1941))

B. Cavalier's Proposed Truck Roll Charge Is Inappropriate.

Cavalier says that Verizon's "loop installation failure" forces Cavalier to dispatch its own trucks, and that Verizon should pay for these truck rolls. *Cavalier Post-Hearing Brief* at 72. The evidence shows, however, that the truck rolls for which Cavalier seeks payment often occur for reasons beyond Verizon's control, and that, even if Verizon makes a mistake in installing a loop, Cavalier can reduce truck rolls by taking a few reasonable steps.

Cavalier does not offer any evidence that its truck rolls are reasonable or necessary. Rather, Cavalier witness Webb stated that, upon completion of the installation of a new loop, Cavalier checks to see whether the loop is working by making a test call to the customer. If Cavalier is unable to reach the customer to verify that service has been established, Cavalier dispatches a technician. *Webb Direct* at 5:10-12; *Hearing Tr.* at 633:19-21 (Webb). Cavalier wants to be paid for each of these truck rolls. *Clift Direct* at 22:18-20. However, there are a number of reasons, through no fault of Verizon, why Cavalier may be unable to reach a customer immediately after a loop is installed. The customer may not be home when Cavalier calls; the customer may not yet have purchased a telephone; or the customer may simply have decided not to pick up the call.

Cavalier has not offered any evidence that it takes steps to reduce its truck rolls. For example, Cavalier could reduce its truck rolls by participating in Verizon's Cooperative Testing program for digital (or xDSL-capable) loops, which cost the same as analog loops. Verizon's Proposed Exhibit A(VI). Under this program, in which most CLECs participate, when Verizon completes a service installation, a Verizon technician calls Cavalier at a number Cavalier provides on the order form. The Verizon technician then works with Cavalier in real time to confirm that the service is working. If the service is not working, Verizon will not charge Cavalier to resolve the problem. *Albert Panel Rebuttal* at 21:23 – 22:3.

Cavalier bases its proposed truck roll rates on the erroneous premise that Verizon "suffers no consequence by failing to deliver dial tone or to keep its appointments." *Cavalier Post-Hearing Brief* at 72. That is false, as the record in this case and the public record of the PAP proceeding in Virginia amply demonstrate. The PAP contains a comprehensive set of performance measurements for timeliness, reliability, and quality of service, as well as self-executing remedies that put up to $205 million at risk annually if performance falls below certain standards. *See* Order, *Establishment of a Performance Assurance Plan for Verizon Virginia Inc.*, PUC-2001-00226 (Va. SCC, Filed July 18, 2002); *Albert Panel Direct* at 28:11 – 29:5 (describing the PAP approved by the Virginia SCC and the Commission); *Agro Rebuttal* at 5:13 – 7:16 (describing the performance metrics pursuant to which Verizon would pay Cavalier for failing to install a loop or missing an appointment); *Agro Surrebuttal* at 1:1 - 2:25 (describing the performance metrics specific to UNE loops pursuant to which Verizon would pay Cavalier for failing to install a loop or missing an appointment).

Cavalier also claims that Verizon causes loop installation problems on a "massive scale." Again, this is simply not true. The Virginia SCC has set benchmark performance standards, below which Verizon would be required to pay CLECs for performance failures. Verizon has met these standards by providing Cavalier with generally better service than Verizon provides to its own retail customers. For example, in the last four months of PAP reports (March – June), Verizon's performance on 24 related Loop provisioning and maintenance measures in each month exceeded the benchmark standard. More specifically, Verizon provided better service to Cavalier than to its own retail customers in 82 of the 96 instances. In another 12 instances, the differences in service provided to Cavalier as opposed to Verizon's retail customers were statistically insignificant. Only in the remaining two instances did Cavalier customers receive statistically worse service than Verizon's own retail customers. While these two instances did not trigger payments under the old PAP, they would trigger payments under the Virginia SCC's newly ordered PAP that went into effect in July. *Agro Surrebuttal* at 2:29 – 3:6.

Contrary to Cavalier's assertions, the PAP does hold Verizon "financially accountable for its acts and omissions" with respect to provisioning and maintenance. Both the Virginia SCC and the Commission have approved that PAP as effective in ensuring non-discriminatory treatment of CLECs. *See* Order, *Establishment of a Performance Assurance Plan for Verizon Virginia Inc.*, PUC-2001-00226 (Va. SCC, Filed July 18, 2002); *Virginia § 271 Order* ¶ 198 ("[w]e find that the Virginia [Performance Assurance] Plan is reasonable to ensure an open and local market in Virginia"). The Commission has also noted that the PAP can be changed. *Virginia § 271 Order* ¶ 198. In fact, as Verizon witness Agro explained, the Virginia PAP has recently been modified to measure UNE loop and UNE platform performance separately and hold Verizon financially accountable for the very performance lapses about which Cavalier complains. *Agro Surrebuttal* at 1:17-19. Yet Cavalier still contends that the PAP "skews data relating to Cavalier as provider of … UNE-L " *Cavalier Post-Hearing Brief* at 80. If Cavalier wishes to challenge the benchmark measures that the Virginia SCC has set, it should petition the Virginia SCC to change them.

Cavalier contends that the PAP does not "provide … dollar for dollar reimbursement" for a Cavalier truck roll, and that is true. *Cavalier Post-Hearing Brief* at 79-80. But the Act does not require "dollar for dollar reimbursement" for these services. The Act does not require Verizon to provide perfect service to CLECs. *Virginia Arbitration Order* ¶ 709 ("Verizon has not duty to provide perfect service to its own customers; therefore it is unreasonable to place that duty on Verizon to provide perfect service to [CLECs].") The PAP strikes the right balance by requiring Verizon to pay Cavalier only when it provides Cavalier with worse service than it provides itself, *not* in *every instance* that Verizon fails to provide perfect service. *See Carrier-to-Carrier Guidelines* at 6 (explaining the appropriate retail analogs for wholesale provisioning). The Bureau has recognized the difference between perfect service and nondiscriminatory service, holding that "Verizon has no duty to provide perfect service to its own customers; therefore it is unreasonable to place that duty to provide perfect service to [CLECs]." *Virginia Arbitration Order* ¶ 709.

Cavalier's proposed charges are also ill advised as a policy matter. In effect, Cavalier is seeking the ability to provide cost-free maintenance. Dispatching technicians is a cost of doing business, and Verizon should not have to subsidize Cavalier's maintenance costs. Cavalier's proposal contains no limiting language and provides no incentive for Cavalier to reduce its truck rolls. On the contrary, it provides Cavalier with the perverse incentive to increase its truck rolls at the expense of Verizon rate-payers.

Cavalier again asserts that Verizon plans to charge Cavalier retroactively for three years of past truck rolls. *Cavalier Post-Hearing Brief* at 80. Cavalier cites a Verizon industry letter dated September 8, 2003 that informed CLECs that although Verizon had been entitled since 2000 to assess three charges relating to truck rolls in several states, it had not done so and planned to bill CLECs retroactively for these charges. But as Cavalier witness Webb acknowledged at the hearing, Virginia was not one of the states included in this letter. *Hearing Tr.* at 646:6-10. Staff asked at the hearing whether Verizon plans to bill these charges retroactively in Virginia. The answer is no. Two of the three charges discussed in the letter ("TC Not Ready" and "Expedite") are not charges that have been approved in Virginia and

Verizon does not bill for them. Verizon has been accurately billing the third charge ("Dispatch") in Virginia, so there is no need to bill it retroactively.

C. Cavalier Cannot Charge Verizon To Install UNE Loops Because It Does Not Provide Verizon With UNE Loops.

Cavalier correctly states that when a customer changes service from Verizon to Cavalier and Cavalier orders a UNE loop to serve that customer again, Verizon charges Cavalier $13.49 for the installation of the loop. *Cavalier Post-Hearing Brief* at 75. When a customer moves from Cavalier back to Verizon, however, Cavalier does not provide Verizon with the facility for the customer's line. Verizon already has that facility. Thus, it makes no sense to allow Cavalier to charge Verizon a UNE installation charge.

It is true that Cavalier performs certain functions when a customer moves to Verizon (and Verizon performs virtually the same functions when its customer moves to Cavalier). However, Verizon does not charge Cavalier for these functions. In fact, Verizon does not charge Cavalier for *any* of the functions that Cavalier witness Ferrio describes in his Direct Testimony (*Ferrio Direct* at 3:3-4) or that Cavalier describes in its post-hearing brief. *Cavalier Post-Hearing Brief* at 76. Rather, Verizon charges Cavalier $13.49 for *the installation of a UNE loop*, a service that that neither Cavalier nor any other CLEC provides to Verizon. *Ferrio Direct* at 3:30.

In addition, none of the "winback" charges Cavalier proposes are for wholesale services. Deleting switch translations, porting a number, and discontinuing customer billing are *retail* functions that are properly charged to the end user. In fact, Cavalier has an LNP surcharge for its end-users in its access tariffs. Indeed, Cavalier would have to perform these functions whether its customer transferred to Verizon, another carrier, or discontinued its telephone service altogether.

Cavalier's assertion that Verizon agreed to compensate Cavalier for parallel winback functions is erroneous. *Cavalier Post-Hearing Brief* at 72. In fact, Verizon and Cavalier agreed that, if Cavalier were performing the exact same functions as Verizon and if Verizon charged Cavalier for those functions, Cavalier could properly charge Verizon for those "parallel" functions. In this case, there are no functions for which Cavalier is entitled to charge Verizon. Verizon does not charge Cavalier for the parallel functions that Cavalier performs in the event of a customer migration. Verizon's position has been consistent throughout the parties' dealings – Cavalier should not be allowed to charge Verizon for parallel functions *for which Verizon does not charge Cavalier.*

Cavalier's most recent argument – that its proposed winback charge is somehow related to Verizon's disconnect charge – should also be rejected. Verizon's disconnect charge is not a "winback" charge, as Cavalier claimed for the first time at the hearing and again in its brief. *Hearing Tr.* at 638:1-9 (Ferrio); *Cavalier Post-Hearing Brief* at 77. These two charges apply to entirely different functions. Verizon's disconnect charge is a Virginia SCC-approved charge that covers work for disconnecting a UNE loop.[10] Cavalier does not provide UNE loops to Verizon and, obviously, does not disconnect them either. Verizon's SCC-approved disconnect charge applies in *any* situation where Cavalier stops providing service to a customer over a loop. Examples include cases where a Cavalier customer moved, went out of business, shifted to a carrier other than Verizon, or wanted a new service from Cavalier that could not be provided over the existing loop – that is, situations in which there is no winback.

The situation when Cavalier loses a customer to Verizon is no different than when Cavalier loses a customer to *any* facilities-based CLEC. Cavalier is still required to perform all

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[10] *Final Order, Ex Parte To determine prices Bell Atlantic-Virginia, Inc is authorized to charge Competitive Local Exchange Carriers in accordance with the Telecommunications Act of 1996 and applicable State law,* PUC970005 at 24 (Va SCC April 15, 1999)

of the functions that Mr. Ferrio describes in his testimony. *Ferrio Direct* at 3:3-4. Yet, if Cavalier's proposed "processing charge" (Cavalier's Proposed Section 11.17.1) is adopted, Verizon would be the only carrier in Virginia required to pay for winning a customer from Cavalier. Cavalier witness Clift admitted at the hearing that no other carrier in Virginia – including AT&T, Cox, or MCI – pays Cavalier a charge when it wins a customer from Cavalier. This discriminatory result is the very reason why charges such as Cavalier's winback charge are more appropriately contained in tariffs that apply to *all* similarly situated carriers, rather than in a two-party interconnection agreement where only Verizon would be required to pay.

In short, Cavalier seeks compensation for a) functions that Cavalier does not perform (*i.e.* the installation or disconnection of UNE loops) or b) retail services for which Verizon does not charge (*i.e* deleting switch translations and porting the number). Cavalier contends that without this language Verizon is "paying bupkis for Cavalier's services." *Cavalier Post-Hearing Brief* at 77. This is nonsense. Verizon should not have to pay Cavalier for services it does not perform, such as the installation and disconnection of UNE loops, or *retail* services that Cavalier performs to serve its own customers. The Bureau should reject Cavalier's proposed winback charges.

For all of the reasons stated above, the Bureau should reject Cavalier's proposed additions to Section 11.17 and Exhibit A(2).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 3rd day of November, 2003, the Reply Brief of Verizon Virginia Inc. in the above-captioned proceeding was served on the following parties:

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